

NO. 2013 –

A RESOLUTION to amend the Comprehensive Plan, Water Code and Administrative Manual – Part III Water Quality Regulations to revise the stream quality objectives for total polychlorinated biphenyls (Total PCBs) for the Delaware River Estuary and Delaware Bay for the protection of human health from carcinogenic effects.

WHEREAS, the Commission's Toxics Advisory Committee (TAC) unanimously voted in January 2001 that the DRBC should revise its water quality criteria for PCBs to reflect the most current EPA guidance, including the use of bioaccumulation factors and estuary-specific data on fish consumption; and

WHEREAS, by Resolution No. 2003-11 in March of 2003, the Commission authorized the Executive Director, among other things, to initiate notice and comment rulemaking to revise the Commission's PCB human health water quality criteria effective on or after January 1, 2004 to reflect site-specific data on fish consumption, site-specific bioaccumulation factors, and current U.S. Environmental Protection Agency guidance on development of human health water quality criteria; and

WHEREAS, such rulemaking was postponed pending additional technical effort by the Toxics Advisory Committee to refine the revised criterion and a separate effort by the Implementation Advisory Committee to develop recommendations for achieving reductions in PCB loadings to the river; and

WHEREAS, applying the most recent estuary-specific data available, the TAC, with the assistance of a Toxics Criteria Subcommittee that included technical experts representing the regulated community, developed a revised human health water quality criterion for PCBs for the Delaware Estuary and Bay of 16 picograms per liter; and

WHEREAS, on July 7, 2005 the TAC voted to recommend to the Commission that notice and comment rulemaking be initiated on a revised water quality criterion for PCBs of 16 picograms per liter for the protection of human health from carcinogenic effects; and

WHEREAS, by Resolution No. 2005-19 adopted in December of 2005, the Commission authorized and requested the Executive Director to proceed with notice and comment rulemaking in accordance with Resolution No. 2003-11 on a proposal to revise the Commission's ambient human health water quality criteria for PCBs, which currently vary by Water Quality Management Zone, to a uniform value of 16 picograms per liter to become effective on or after January 1, 2007; and

WHEREAS, by the same resolution, the Commission authorized and requested the Executive Director to convene a working session or sessions to develop recommendations for implementing criteria for bioaccumulative pollutants, which include but are not limited to PCBs, noting that recommended approaches be consistent with the existing Clean Water Act National Pollutant Discharge Elimination System (NPDES) framework while also reflecting principles of

adaptive management and that participants include staff of the DRBC, EPA Regions 2 and 3 and the signatory state environmental agencies (“co-regulators”), along with agency staff from outside the Basin who are experienced in developing or applying rules designed to implement water quality criteria that cannot be achieved within a single NPDES permit cycle; and

WHEREAS, on August 14, 2009, the Commission published notice of a proposed rule (a) amending the Commission’s ambient human health water quality criteria for PCBs for Water Quality Zones 2 through 5 to establish a uniform criterion of 16 picograms per liter, and (b) extending the criterion to Delaware Bay (Zone 6); and simultaneously invited comment on a proposed TMDL Implementation Plan developed by the co-regulators; and

WHEREAS, based on the comments received, the Commission deferred action on its rulemaking proposal pending refinement by the co-regulators of implementation strategies for point sources; and

WHEREAS, between August 1, 2013 and August 17, 2013, the Commission again published notice in the *Federal Register* and member state registers of and sought comment on a proposed rule to establish a uniform criterion for Total PCBs for the Delaware Estuary and Bay (Water Quality Zones 2-6) of 16 picograms per liter, and simultaneously invited comment on an implementation strategy that was revised as to point sources; and

WHEREAS, the Commission held a public hearing on the proposed rulemaking and draft implementation strategy on September 10, 2013 and accepted written comment on these items through September 20, 2013; and

WHEREAS, four commenters filed written comments on the proposed rule and the draft implementation strategy, and two of these also commented in person at the public hearing; and

WHEREAS, after reviewing the comments, Commission staff prepared a Response to Comments document; and

WHEREAS, the Commission has considered the comments received and concurs in the recommendations set forth in the Response to Comments document prepared by staff; and

WHEREAS, the proposed uniform water quality criterion for Total PCBs will protect the health of people who drink water withdrawn from the Delaware Estuary and/or consume fish caught in the Estuary and Bay; and

WHEREAS, the revised criterion for Total PCBs will provide the basis for Stage 2 TMDLs for Water Quality Zones 2 through 6, which are expected to be established by U.S. EPA Regions II and III (“EPA”) to replace the Stage 1 TMDLs established by EPA for the Delaware Estuary in December 2003 and Delaware Bay in December 2006; and

WHEREAS, the Commission understands from the NPDES permitting authorities in the basin that the revised criterion will be implemented in accordance with the draft implementation strategy developed by co-regulators, subject to any technical refinements to that strategy made in

response to comments received to date or in any future comment period. It is the Commission's intention to implement its programs in the same manner; and

WHEREAS, certain regulated dischargers have asked whether Article 6 of the Commission's *Rules of Practice and Procedure* governs the time for an appeal from the criterion, and in response, the Commission notes that by its terms Article 6 does not apply to "any proposed or adopted rule or regulation of the Commission"; now therefore,

BE IT RESOLVED by the Delaware River Basin Commission:

1. In accordance with the rule text amendments set forth below, the Commission's Water Quality Regulations, Water Code and Comprehensive Plan are hereby amended to establish a uniform criterion for Total PCBs for the protection of human health from carcinogenic effects in Water Quality Zones 2 through 6 (the Delaware Estuary and Bay) equal to 16 picograms per liter.
2. These amendments shall become effective 30 days following the last date of publication in the *Federal Register* and member state registers, provided, however that:
3. The Commission concurs with the implementation strategy proposed by the co-regulators, including the issuance of requirements in NPDES permits consistent with that strategy (subject to any necessary technical refinements). The Commission further concurs with the co-regulators' intended use of the existing NPDES permit approach, which was published as an appendix to the Stage 1 TMDLs, until the Stage 2 TMDLs are established based on the revised criterion. The Commission intends to utilize the same principles in administering its own PCB program.

BY THE COMMISSION

ADOPTED:

In accordance with the foregoing,

Section 3.30 TABLE 6: STREAM QUALITY OBJECTIVES FOR CARCINOGENS FOR THE DELAWARE RIVER ESTUARY AND BAY of Article 3 of the Water Code and Article 3 of the Administrative Manual - Part III Water Quality Regulations, 18 CFR 410, are hereby amended as follows:

For the parameter "PCBs (Total)", in the column headed "Freshwater Objectives (ug/l): Fish & Water Ingestion," remove the number "0.0000444" and insert "0.000016"; in the column headed "Freshwater Objectives (ug/l): Fish Ingestion Only," remove the number "0.0000448" and insert "0.000016"; and in the column headed "Marine Objectives (ug/l): Fish Ingestion Only," remove the number "0.0000079" and insert "0.000016".